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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

T.B. , Allison Brenneise and Robert Brenneise, Plaintiffs, v. San Diego Unified School District, Defendant.	Case No. 08 CV 0028 WQH WMc **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S AMENDED MOTION TO DISMISS THIRD AND FOURTH CLAIMS** Date : May 12, 2008 Time : 11:00 am Dept : Courtroom 4 Judge : William Hayes Trial: None Set Complaint Filed: January 2, 2008

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I. PLAINTIFFS LACK STANDING TO BRING THEIR THIRD CLAIM BECAUSE THEY ARE NOT AGGRIEVED BY THE FINDINGS THEY SEEK TO ENFORCE

In order to have standing in this Court, plaintiffs must be aggrieved by the determinations for which they seek review. 20 U.S.C. § 1415(i)(2)(A). The fact that the Ninth Circuit recently granted a petition for rehearing of *Levina v. San Luis Coastal Unified School Dist.*, 514 F.3d 866 (9th Cir. 2007), does not change that reality.[1] Common sense alone dictates that a plaintiff would not seek to enforce adverse findings, and that he would not be aggrieved by findings in his favor. The law follows this logic. In IDEA cases, district courts lack subject matter jurisdiction over parents' claims to enforce portions of administrative determinations that were favorable to them because the parents are not aggrieved by those portions of the hearing officer's findings and decision. *See e.g., Brennan v. Regional School Dist. No. Bd. of Educ.,* 531 F.Supp.2d 245, 260 (D.Conn. 2008).

In *Brennan*, the parents argued "that they were entitled to enforcement of the parts of the administrative order that were favorable to them…" *Id.,* at 256. The court explained:

> [t]he problem with the parents' enforcement claim is that the parents are not "aggrieved" by that portion of the "findings and decision" made by the HO during the impartial due process hearing and which are the subject of the partial summary judgment motion. Rather, they are "aggrieved" with the steps that the state BOE has taken (or failed to take) to enforce the HO's decision pursuant to state law.

In fact, in *Brennan* the court found "[n]othing in IDEA authorizes the parents' enforcement suit." *Id.*, at 261 citing, *C.C. v. Granby Bd. Of Educ.,* 453 F.Supp.2d 569, 577 (D.Conn., 2006) (20 U.S.C. § 1415(i)(2)(A) "does not entitle a prevailing party to seek enforcement of a hearing officer's decision in federal court"). In an effort to escape this reality, Plaintiffs assert this case is unlike *Moubry v. Independent Sch. Dist. No. 696,* 951 F.Supp.867 (D.Minn. 1996). (Pl.Opp. at p. 2, ln.24-27, fn. 3). On the contrary, like plaintiffs here, the plaintiff in *Moubry* sought to appeal portions of the decision which were not favorable, and sought to enforce portions of the decision which were favorable. *Id.,* at 885-886. The court disagreed with the plaintiff that he was "aggrieved" by the district's failure to implement favorable findings: instead, the court held "the IDEA does not contemplate an action to enforce an administrative decision … because jurisdiction under that Act is limited to parties who are aggrieved *by an administrative decision.*" *Id.*, at 885. Here, like in *Moubry*,

[1] See *Levina v. San Luis Coastal Unified School Dist.* (9th Cir. 2008) --- F.3d —, 2008 WL 1849804.

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plaintiffs are seeking enforcement of the portions of the decision ordering modification of the December 4, 2006 IEP, while simultaneously arguing the rest of the IEP, which the ALJ found appropriate, is inappropriate. Their attempt to implement isolated aspects of the decision is fundamentally at odds with their appeal contending the December 4, 2006 IEP is inappropriate whole. (See Case No. 08 CV 0028). It also ignores the fact that the District was never actually ordered to do the things plaintiffs say they were required to do. Instead, the ALJ *permitted* the District to the modified December 4, 2006 despite plaintiffs lack of consent. In fact, the District could have developed and offered an entirely new IEP.[2]

Plaintiffs' attempt to disregard *Moubry* is further undermined by the decision in *S.M. v. Cupertino Union School Dist.,* 2006 WL 1530025 (N.D. Cal. 2006). In *S.M.*, the plaintiff alleged, in part, that the school district had not implemented the underlying administrative order and requested that the court provide a compensatory remedy on that basis. *Id.*, at *2. The district, in asserting failure to exhaust, argued student could not simultaneously seek to overturn the school-based placement ordered in the administrative hearing and also claim that the return to that disputed program was not properly implemented. *Ibid.* In granting the district's motion for judgment on the pleadings, the court, citing to *Moubry,* explained:

> This Court has jurisdiction to enforce an *unappealed* order issued as a result of an IDEA due process hearing. However, this Court cannot simultaneously enforce an administrative order and consider an appeal of that same administrative order .... The Plaintiff's claim is fundamentally flawed, for it impermissibly seeks protection from what, at this point, is only an anticipatorily adverse ruling by this Court.

Id., at *3 (emphasis in original, internal citations omitted). Thus, plaintiffs' third claim must be dismissed.

The remainder of plaintiffs' arguments in this regard, although basically unintelligible, suggests this Court is the only venue available to them to enforce the due process decision. (Pl. Opp., at 3). On the contrary, Plaintiffs' have available to them, and are in fact required to pursue their third claim through the administrative due process procedures required by the IDEA. 20 U.S.C. § 1415. In fact, the last time plaintiffs believed the District denied plaintiff T.B. a FAPE by failing to implement his stay put IEP they did just that, file for due process. (Decision, Issue 16). Such is also required here also.

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[2] Plaintiffs fail to mention the District did in fact modify the December 4, 2006 IEP in compliance with the ALJ's decision shortly after receiving the decision, forward the modified IEP to plaintiffs for consent, and implemented that modified IEP. That IEP expired by its own terms on December 3, 2007, triggering the District's obligation to review that IEP and make another annual offer of FAPE. 20 U.S.C. 1414(d)(4). The District held an annual review on November 29, 2007 and December 21, 2007, memorialized in an IEP dated December 21, 2007, which plaintiffs now complain for the first time violated the IDEA.

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II. THIS COURT LACKS JURISDICTION TO HEAR PLAINTIFFS THIRD CLAIM BECAUSE THEY FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

In plaintiffs' Amended Complaint they allege, for the very first time, that the District has violated the IDEA, i.e. denied T.B. a FAPE, by failing to implement the December 4, 2006 IEP, as modified by the October 2007 Order, even after the December 4, 2006 IEP expired by its own terms on December 3, 2007, and even after the District offered a new annual IEP on November 29 and December 21, 2007 to which the Brenneises refused to consent. Plaintiffs are not entitled to any compensatory relief in this appeal regarding stay put or the new annual IEP since they have not exhausted their administrative remedies (or even tried).

As the Ninth Circuit recognizes:

> Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency . . .

Hoeft v. Tucson Unified School Dist., 967 F.2d 1298, 1303 (9th Cir. 1992). This exhaustion requirement ensures that "[f]ederal courts - generalists with no experience in the educational needs of handicapped students - are given the benefit of expert fact-finding by a state agency devoted to this very purpose." *Ibid.* (internal citations omitted). Plaintiffs here are asking this Court to do exactly the opposite of what the law requires - allow them to bypass the IDEA's administrative process and have this Court adjudicate, in the first instance, whether the District's actions and IEP programming offers subsequent to the underlying due process hearing violated the IDEA. If plaintiffs are allowed to proceed on their third claim, it will require this Court to develop, from scratch, a complete factual record, given plaintiffs' failure to exhaust their administrative remedies. This is simply not allowable under the IDEA.

Plaintiffs also argues that because OAH's decision is final and binding, it constitutes T.B.'s "stay put" placement. However, if they believe the District is violating the stay put provision of the IDEA, they should seek an injuction, not affirmative relief. Hence the reason, as plaintiffs point out, T.B.'s "stay put" placement may continue for so long as this appeal lasts. If plaintiffs were permitted to litigate this and all future implementation issues directly in federal court, they would, in essence be relieved of any exhaustion obligation for the duration of T.B.'s educational life. This is not what Congress intended, and would result in a huge burden on the Court to adjudicate every time a new dispute in this regard arose between the parties.

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A. Plaintiffs Allege an Injury Clearly and Easily Redressable by the IDEA.

Furthermore, the Ninth Circuit has repeatedly held "that when a plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies, exhaustion of those remedies is required." *Robb v. Bethel School Dist. No. 403,* 308 F.3d 1047, 1049 (9th Cir. 2002); *see also S.J. ex rel. S.H.J. v. Issaquah School Dist. No. 411*, 2007 WL 2703056, *4 (W.D. Wash. 2007). In fact, until a due process hearing is conducted on a developed record, this court lacks the authority (not to mention the indispensable information) required to hear Plaintiffs' third claim. Hence, "[o]nly decisions made in a hearing conducted by the state or local educational agency are final and reviewable by a district court." *Merrifield v. Lake Cent. School Corp.* (N.D.Ind., 1991) 770 F.Supp. 468, 472.

Here, plaintiffs allege the District's failure to implement the December 4, 2006 IEP, which they contend is now stay put, denied T.B. a FAPE in violation of the IDEA. (Pl. Amended Complaint, p. 6, ¶32). As a sole remedy for that violation, plaintiffs ask this Court to award T.B. compensatory education. (*Id.*, at 8, ¶42). It is without question that the IDEA's administrative procedures are available to redress plaintiffs' alleged denial of FAPE. It is also without questions that Plaintiffs used those very procedures in the hearing at issue here to challenge the District's implementation of T.B.'s last stay put IEP. 20 U.S.C. §§ 1415(b)(6)-(7) and (f); Decision, Issue 16. It is further without question that the OAH has broad discretion to fashion an appropriate remedy if the student prevails in a due process hearing, and that such remedy may include an order of compensatory education. *School Comm. of the Town of Burlington v. Department. of Ed.,* 471 U.S. 359, 369 (1985); *Parents of Student W. v. Puyallup School Dist., No. 3,* 31 F.3d 1489, 1497 (9th Cir. 1994). Plaintiffs do not contend otherwise, nor do they contend exhaustion would be futile or inadequate.[3]

Furthermore, Plaintiffs do not seek an injunction, but rather a retrospective compensatory remedy. Stay put injuctions are clearly within the hearing office's jurisdiction, and a due process proceeding is clearly available to adjudicate Plaintiffs' current allegations framed in terms of stay put. 20 U.S.C. 1415(j)-(k). In fact, Plaintiffs have already availed themselves to that process regarding T.B.'s prior stay put IEP. Moreover, to the extent Plaintiffs are claiming the failure to implement stay put amounted to a substantive denial of

[3] Exhaustion is not required if it would be futile or offer inadequate relief, *Honig v. Doe*, 484 U.S. 305, 326-27 (1988), or if the agency "has adopted a policy or pursued a practice of general applicability that is contrary to the law." *Hoeft*, 967 F.2d at 1303-04. The party alleging futility or inadequacy of IDEA procedures bears the burden of proof. *Id.* at 1303. Plaintiffs allege none of the above.

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FAPE, they are even more so required to exhaust their administrative remedies. *See e.g., Termine v. William S. Hart Union High School Dist.*, 90 Fed.Appx. 200 (9th Cir. 2004), amending and superseding 219 F.Supp.2d 1049 (inappropriate to consider stay put in isolation); *R.K. ex rel. T.K. v. Hayward Unified School Dist.*, 246 Fed.Appx. 474 (9th Cir. 2007) (affirming dismissal for lack of jurisdiction because student "failed to exhaust administrative remedies as to his request for stay put thereby placing his stay put request outside the express language of the IDEA"). If plaintiffs believe the District has denied T.B. a FAPE since the due process hearing, the proper venue is the OAH, not this Court.

B. Exhaustion Is Required Even Where the Sole Issue Is Failure To Implement an IEP

Plaintiffs' authority for their contention "exhaustion is not required when the sole issue is failure to implement an IEP" is equally unpersuasive. The Ninth Circuit has required such exhaustion. *Kutasi v. Las Virgenes Unified School Dist.*, 494 F.3d 1162, 1168-1170 (9th Cir. 2007); *see also Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 815-817 (9th Cir. 2007) (OAH adjudicated implementation of IEP). In fact, plaintiffs cite to a case which required exhaustion of an implementation claim. *Polera v. Bd. of Educ. of the NewBurgh Enlarged City Sch. Dist.*, 288 F.3d 478 (2nd Cir. 2002) ("futility of administrative exhaustion was not established merely by virtue of allegation that school district had failed to provide promised services"). In *Polera*, the court found: "[t]he relevant state and local administrative agencies have the capacity to find that an IEP … has not been complied with…. In other words, the administrative system is uniquely well suited to review the… implementation of IEPs. . ." *Id.*, at 486-487. The same goes here, where plaintiffs are not asking this Court to determine whether the District complied with an unappealed administrative order, but instead, are asking this Court to determine whether an alleged failure to implement an IEP amounted to an additional denial of FAPE for which plaintiff T.B. would be entitled to an award of compensatory education. Exhaustion is required because these issues are squarely within administrative expertise of OAH.

III. COMPLIANCE PROCEDURES CANNOT, AS A MATTER OF LAW, GIVE RISE TO PREVAILING PARTY STATUS UNDER THE IDEA

Plaintiffs contend they are "entitled to attorneys' fees as the prevailing party in the CDE compliance procedure." (Pl.Opp. 8, lns 4-5). However, the complaint resolution process ("CRP") lacks the necessary judicial imprimatur required for plaintiffs to achieve prevailing party status under the IDEA. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.* (2001) 532 U.S. 598; *Shapiro v. Paradise*

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Valley Unified Sch. Dist., 374 F.3d 857, 865 (9th Cir.2004). In their opposition, plaintiffs mistake the legal standard for an award of attorneys' fees under the IDEA. While it is true that they must show that they have "prevailed" in an "action or proceeding" brought under 20 U.S.C. § 1415, they must also show that the relief they obtained bore a "judicial imprimatur." *Ibid.*

Section 1415 of the IDEA is entitled "Procedural Safeguards," and the only "actions or proceedings" referenced in that section are due process administrative hearings and appeals from such hearings. 20 U.S.C. §§ 1415(f)-(i); *Vultaggio v. Board of Educ.*, 343 F.3d 598, 602 (2d Cir. 2003); *Melodee H. v. Dept. of Educ.*, 374 F.Supp.2d 886, 891 (D. Haw. 2005); *Megan C. v. Indep. Sch. Dist. No. 625*, 57 F.Supp.2d 776, 783, 785 (D. Minn. 1999). Nowhere does the IDEA reference compliance review by a state agency, much less a specific CRP. *Ibid.* Even in the regulations establishing the CRP process, such was not classified[4] as a "Procedural Safeguard" under the IDEA, nor enacted pursuant to the IDEA. Instead, the CRP regulations cite as their sole authority 20 U.S.C. section 1221e-3, the statute that establishes rulemaking authority for the Secretary of Education. See, 34 C.F.R. §§ 300.660-662. Further, unlike the regulations promulgated under section 1415, the CRP regulations do not explicitly provide for attorneys' fees, while the former do. Compare 34 C.F.R. § 300.513 and § 300.660-662 and see *Megan C.*, at 785-86; *Vultaggio*, at 601.

The comments to the 2006 IDEA regulations now clarify that this was no mistake: the United States Department of Education ("DOE") did not intend to authorize attorneys' fees when it created the CRP process. (71 Fed. Reg. 46602). On that basis alone, *Lucht v. Molalla River School District*, 225 F.3d 1023 (9th Cir. 2000) must be revisited, as the agency that created the CRP process in the first place has since unequivocally indicated such process never authorized attorneys' fees awards.[5] It should also be revisited because the Supreme Court has since required judicial imprimatur on the relief obtained in order to achieve prevailing party status. *Buckhannon*, 532 U.S. at 604-605. Plaintiffs' statement that their entitlement to fees pursuant to the *Lucht* decision was reaffirmed by *P.N. v. Seattle School District*, 474 F.3d 1165 (9th Cir. 2007) is false and misleading. In *P.N.*, the Ninth Circuit cited *Lucht* for the proposition that the federal court

[4] Subpart E (§§ 300.500-300.537) of the Federal Regulations delineate the Procedural Safeguards available under the IDEA, whereas Subpart F (§§ 300.600-300.718), classified as "Monitoring, Enforcement, Confidentiality, and Program Information," is the CRP.

[5] In *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023 (9th Cir. 2000) the Ninth Circuit's relied on the fact that "[t]here is nothing in the statute or regulations that tends to show that Congress meant to allow an award of attorney fees to only those parents who choose to invoke one means of resolving a ... complaint and not another." *Lucht*, at 1039. This is no longer accurate, given DOE commentary.

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had jurisdiction over an action solely[6] to recover attorneys' fees under the IDEA. *Id.* at 1169. The District does not dispute this. Notwithstanding, the Ninth Circuit repeatedly affirmed the *Buckhannon* holding's applicability here. *Id.* at 1168, 1170. Thus, contrary to plaintiffs' assertions, *P.N.* does not provide authority for entitlement to fees under the IDEA absent the necessary judicial imprimatur.

Plaintiffs try to confuse the issue by stating the obvious – that a due process hearing before an administrative law judge is an "action or proceeding" under the IDEA and that a decision rendered by an ALJ bears a "judicial imprimatur." Again, the District does not dispute this. Plaintiffs' argument nevertheless misses the point behind the requirement. A due process hearing is a quasi-judicial proceeding, and the CRP is not.[7] See, *Butz v. Economou*, 438 U.S. 478, 512-13 (1978) (applying judicial immunity to administrative law judges because they perform judicial functions); *J.R. v. Sylvan Union Sch. Dist.*, 2008 WL 682595, *22 (E.D. Cal. 2008) (holding that OAH was entitled to judicial immunity for conduct in a due process hearing). Due process hearings involve the exchange of documents and witness lists, the right to prohibit evidence not properly disclosed, recorded testimony under oath, the right to present, confront and compel the attendance of witnesses, the right to present and compel the production of documents, a standard for the admissibility of evidence, a final and binding written decision based on the evidence adduced at hearing, a resolution of the dispute by a trained and impartial administrative law judge with expertise in the area, and an appeal to federal court by the parties based on an administrative record. The statute further provides for the right to be accompanied and advised by an attorney. 20 U.S.C. § 1415(f)-(i). A compliance review, on the other hand, involves an exchange of correspondence between the complainant, the responding agency, and the state educational agency (SEA) and a perfunctory determination of compliance by a bureaucrat. 34 C.F.R. §§ 300.660-662; see e.g. *C.T. ex rel. D.T. v. Vacaville Unified School Dist.*, Slip Copy, 2006 WL 2092613 ("The court does not dispute that the initiation of a state level review must culminate with a due process hearing to fully exhaust the administrative remedies available under the IDEA, where a due process hearing is available to the requesting party."). Further, the CRP does not afford parties any of the rights denominated as "Procedural Safeguards" in section 1415. *Megan C.*, at 781-82. Plaintiffs cite no

[6] Even though no appeal of the administrative proceeding is pending.
[7] "Administrative" connotes of or pertains to administration, especially management, as by managing or conducting, directing, or superintendent, the execution, application, or conduct of persons or things. Particularly, having the character of executive or ministerial action. In this sense, administrative functions or acts are distinguished from such as are judicial. Blacks Law Dictionary, Abridged 5th Ed.

authority for the proposition that the CRP conveys the necessary judicial imprimatur.

Contrary to Plaintiffs argument, as explained in *Smith v. North Thurston Sch. Dist.*, 44 IDELR 281, *4 (W.D. Wash. 2005), the right to enforce the compliance determination "is not akin to the court 'sanctioning' the agreement." Instead, the court explained, to attain prevailing party status, "*Buckhannon* requires more, as *Shapiro* correctly points out." For the same reason, it is irrelevant here that a compliance complaint order can be enforced in court. The fact that a private settlement agreement or an agency decision could, if violated, someday result in a court order does not mean that it has the necessary judicial imprimatur at the time it was issued.[8] The Supreme Court made it clear that for purposes of obtaining an award of attorneys' fees, it is not sufficient that the plaintiffs' efforts resulted in relief on the merits. *Buckhannon*, at 604-605. It is likewise insufficient that the resolution obtained obligated one party to do something it would otherwise not have to do. *Ibid.* Instead, there must be "some judicial sanction." *P.N., supra*, at 1173.

Moreover, plaintiffs' cite no support for their suggestion that compliance complaint orders can actually be enforced in federal court through a 42 U.S.C. section 1983 action. The CRP regulations state that the SEA must provide for remedies for the denial of appropriate services and a procedure for the implementation of that decision. 34 C.F.R. §§ 300.660(b), 300.661(b)(2). The California implementing regulations allow the SEA to take measures to effect compliance by withholding funds or by "proceeding in a court of competent jurisdiction for an appropriate order compelling compliance." 5 Cal. Code of Regs., § 4670(a)(3). Thus, as plaintiffs point out, the California regulations provide for the SEA to enforce an order in court. What plaintiffs fail to acknowledge is that neither the federal nor the state regulations allows a parent (or student) to file a civil action for enforcement in federal court. This is likely because "there is no avenue of appeal from an unfavorable SEA decision." *Vultaggio*, at 601; *See also Megan C.*, at 790 ("Not only is this procedure nowhere set forth in the [IDEA], but it is different in purpose, scope and procedure from the administrative relief provided for under the statute, and provides no statutory entitlement to sue a local school system, or its officials, in federal court ..."); *Virginia Office of Prot. and Advocacy v. Virginia Dept. of Educ.*, 262 F.Supp.2d 648, 653, 659 (E.D. Va. 2003) ("Although the IDEA expressly creates a private right of action for those aggrieved by the due process procedure, it does not give the same right to those

[8] Plaintiffs here do not contend that the District has failed to implement the California Department of Education's (CDE) compliance determination or that the CRP process was the only means available to them to exhaust their administrative remedies.

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participating in a [CRP]"); *Wachlarowicz v. School Bd. of Indep. Sch. Dist. No. 832*, 40 IDELR 209, 104 LRP 6716 (D. Minn. 2003) ("If Congress had intended to create a private right of action for complaint resolution procedures decisions, it could have inserted the relevant language in the statute. It cannot be assumed that a private right of action exists for a complaint resolution procedures decision when the statute expressly provides a right of action for due process hearing decisions only"); *R.K. v. Hayward Unif. Sch. Dist.*, 2007 WL 4169111, * 1 (N.D. Cal. 2007) ("the regulations regarding the impartial due process hearing explicitly provide for a private right of action, while the regulations establishing the complaint resolution procedures are silent as to any private right of action"). Furthermore, the Ninth Circuit has recently held that that the IDEA is not enforceable through a 1983 action. *Blanchard v. Morton School Dist.*, 509 F.3d 934, 938 (9th Cir. 2007) ("We … hold that the comprehensive enforcement scheme of the IDEA evidences Congress' intent to preclude a § 1983 claim for the violation of rights under the IDEA").

The lack of private enforceability of a SEA finding makes sense, since those findings are not rendered in an adversarial proceeding with procedural safeguards, and therefore do not result in a final, binding decision that would be entitled to preclusive effect or even substantial deference in court. It also does not change plaintiffs' ability or obligation to seek a due process hearing to exhaust the administrative remedies for those violations which could be redressed by the IDEA before coming to this Court. *See C.T., supra.* Accordingly, while the CRP process may, in some circumstances, provide an adequate means of exhaustion, it clearly lacks the requisite judicial sanctioning.

Finally, public policy counsels against permitting fee awards based on compliance reviews. First, such complaints may be brought by any person or organization, including a person or organization from another state, not just by the real parties in interest. 34 C.F.R. § 300.660(a). Allowing fees for such a process would encourage enterprising attorneys to file complaints based on hearsay or speculation without having to represent the actual student involved. It would also allow them to short step the administrative process specifically delineated in the IDEA at section 1415. Second, there is no right to counsel in the CRP process, as the CRP process was intended to be an informal means by which anyone can get relief with the assistance and expertise of the SEA for free. Creating an incentive for attorneys to participate in this process would undermine its informal nature and drive up the costs. *Megan C.*, at 791. Moreover, because a student may always file a due process complaint even after going through the CRP process, "[n]othing irretrievable is at stake" in that process. "Such a streamlined, informal process would not seem to require or benefit from the participation of lawyers." *Vultaggio*, at 603.

Third, the IDEA was promulgated under the Spending Clause, and as such, only creates a cause of action and only validly abrogates the Eleventh Amendment immunity of state entities, including California school districts, based on what is clearly and unambiguously contained in the statute. There is no cause of action and no waiver of immunity as to obligations not contained in the statute or in the implementing regulations. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose conditions on the grant of federal moneys, it must do so unambiguously"); *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("we will conclude Congress intended to abrogate sovereign immunity [under the IDEA] only if its intention is 'unmistakably clear in the language of the statute'"). Thus, even if there was a cause of action for fees based on a CPR complaint, the District would be immune. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (IDEA did not clearly put states on notice that expert fees might be included in costs and therefore could not be construed to allow for recovery of such fees); *Virginia Off. of Prot. and Advocacy*, at 659-60 (IDEA could not provide private right of action for judicial review of CRP decision since it is not clearly included in the statute). See also, *Vultaggio*, at 603 ("attorneys' fees are only permitted when the statutory text is 'explicit'"), *citing Buckhannon*, at 602.

Fourth, as noted by the court in *Megan C.*, facing the same exposure to attorneys' fees under the CRP as under the impartial due process proceedings of § 1415, defendants would likely demand the procedural safeguards of a due process hearing under § 1415, significantly undermining the utility of the CRP as an informal mechanism for effective enforcement of the provisions of the IDEA. *Megan C.*, at 791. Thus, for all these reasons, and those set out in the District's moving papers, plaintiffs' claim for attorneys' fees for pursuit of a compliance complaint against the District should be dismissed.

DATED: May 5, 2008 MILLER BROWN & DANNIS

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